YUSOF HOLMES ABDULLAH v. PP & ANOTHER APPEAL

HIGH COURT MALAYA, KUALA LUMPUR
COLLIN LAWRENCE SEQUERAH J
[CRIMINAL APPEALS NO: 42(H)-7-01-2017 & 42(S)-8-01-2017]
2 SEPTEMBER 2019

CRIMINAL LAW: *Penal Code – Section 417 – Punishment for cheating – Appointment of arbitrator – Deception in statement of independence – Appeal against conviction and sentence – Whether charge defective – Whether likelihood of damage to reputation sufficient – Whether likelihood of damage to reputation of Kuala Lumpur Regional Centre of Arbitration could be inferred from circumstances of case – Whether testimony of witness sufficiently corroborated – Whether witness an accomplice – Whether accomplice a competent witness – Whether offence serious in nature – Whether custodial sentence merited*

EVIDENCE: *Presumption – Presumption of fact in publication – E-mail communication – Whether accused registered with network service provider as subscriber of network service – Whether e-mails classified as documents – Whether fulfilled requirements of documents produced by computer – Whether email accounts registered in name of accused – Whether active at material time – Whether accused presumed to have published publication – Whether presumption rebutted – Evidence Act 1950, ss. 3, 90A, 114A*

A dispute arose between JMR Construction Sdn Bhd ('JMR') and Nanjing Changjiang Waterway Engineering Bureau ('NCWEB') pertaining to a contract. This led to the filing of a claim by NCWEB against JMR and JMR thus made an application to the Kuala Lumpur Regional Centre of Arbitration ('KLRCA') to appoint an arbitrator. The KLRCA offered the appointment as arbitrator to the appellant *via* a letter ('P5') and the appellant accepted the appointment as the sole arbitrator for the dispute *via* letter of appointment ('P6B') and statement of independence. NCWEB contested the appointment of the appellant as arbitrator and referred the case to the court. However, the court refused the application and ordered that the case be referred to arbitration before the appellant. The final award of the arbitration was in favour of the NCWEB. Pursuant to a complaint, the Malaysian Anti-Corruption Commission officers confiscated two black coloured Dell laptops and one Samsung Galaxy tablet 10.1 which contained e-mails showing the existence of a prior relationship between the appellant and JMR's witnesses in respect of the arbitration proceedings. The appellant was investigated and subsequently charged, at the Sessions Court, with an offence under s. 417 of the Penal Code and an alternative charge under s. 199, punishable under s. 193 of the Penal Code. The appellant was convicted for the offence under s. 417 of the Penal Code and sentenced to a term of imprisonment of six months and a fine of RM20,000, in default, six months

imprisonment. Aggrieved, the appellant appealed against the conviction and sentence. The prosecution cross-appealed against the sentence passed against the appellant.

Held (dismissing appeal against conviction; varying sentence):

(1) While it was evident that there were three parties mentioned in the charge, it was clear from the overall reading of the charge that the party who was stated to have been deceived was the Director of the KLRCA ('SP1'). It was only SP1 who had the power to appoint the appellant as arbitrator. JMR and NCWEB had no such power and besides, they were the parties to the dispute. The charge had stated with clarity the essential ingredients of the offence and was clear as to what the offence alleged against the appellant was. There was nothing to show that a miscarriage of justice was occasioned by the omission to state the damage or harm to any person in body, mind, reputation or property in the charge. Hence, there was no merit in the appellant's submission that the charge was defective. (paras 79, 80, 88, 91 & 92)

(2) It was not necessary that damage to reputation must actually be proven. The likelihood of such occurrence is sufficient. The charge clearly stated that, was it not for the deception through the representation by the appellant in the statement of independence of absence of conflict, SP1 would not have appointed the appellant as an arbitrator. The likelihood of damage to the reputation of the KLRCA occurring as a result of the act of deception performed by the appellant was something that could reasonably be inferred from the circumstances of the particular case. There was thus no merit in the appellant's submission that any of the parties had suffered any form of harm or damages as a consequence of the alleged deception by the appellant. (paras 27, 95 & 98-100)

(3) It was the appellant's submission that the appointment of the appellant as arbitrator was made prior to the issuance of the statement of independence and that the Sessions Court Judge ('SCJ') erred in finding that the appointment of the appellant was not made through P5 as it was just a letter of offer and not an appointment. P5 was a mere conditional letter of offer and did not have the effect of appointing the appellant as arbitrator at that point of time. Further, the issue raised regarding the need to make a disclosure by the appellant with respect to P5 was a mere afterthought because counsel for the appellant had not availed himself of the opportunity to cross-examine SP1 on this issue. The appellant had instead merely confined himself to cross-examining SP1 on the issue of P5 constituting a conditional letter of offer. The failure of the appellant to challenge SP1 on the issue constituted an acceptance of her testimony on the issue. It was clear that the appellant was appointed as arbitrator only after the appellant had signed and forwarded the statement of independence. (paras 101, 103, 110, 113-115)

(4) SP11 was a former manager of JMR and was its advisor and had known the appellant for more than 20 years as the latter had acted as an advisor to JMR. The series of email communications between SP11 and SP8 with the appellant through the email addresses of opera@pc.jaring.my and george@jmr.com.my was with respect to the issue of the dispute between JMR and NCWEB. The appellant had given advice on the course of action that should be taken by JMR against NCWEB. Although the motive behind SP11's role in the whole chain of events were questioned by the appellant because the decision in the arbitration had gone against SP11's company, and he had alleged fraud and corruption against the appellant in trying to set aside the arbitration award, this did not necessarily mean that SP11's testimony was untrue. SP11's testimony was corroborated by other witnesses. The SCJ, having the audio-visual advantage of the witnesses, found that the testimonies of SP11, SP8 and SP9 were credible and this court could not interfere with the assessment of the demeanour of the witnesses by the SCJ in the absence of any good reason. (paras 123, 130 & 132-134)

(5) Although SP11 had, *inter alia*, amended the application to set aside the final award by inserting allegations of fraud and corruption against the appellant, this did not necessarily turn him into an accomplice. SP11 had legitimate interest in applying to set aside the award against JMR and, in the course of doing so, made the allegations with the sole intention of setting aside the award. SP11 played no part in abetting the commission of the crime which was the representation made by the appellant in the statement of independence to the KLRCA. Hence, SP11 was not an accomplice. (paras 139-141)

(6) Further, s. 133 of the Evidence Act 1950 ('EA') stipulates that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeded upon the uncorroborated testimony of an accomplice. The evidence of SP11 was corroborated by SP8. Therefore, there was no merit in the appellant's submission that SP11 had an ulterior motive against the appellant and ought to be considered an accomplice whose evidence required corroboration. (paras 137, 142, 143 & 147)

(7) The appellant was under an obligation both by virtue of s. 14 of the Arbitration Act 2005 ('AA') and article 11 of the United Nations Commission of International Trade Law ('UNCITRAL Rules') to disclose that he knew the parties to the arbitration. The appellant was well aware of such duties and the obligation upon him. The SCJ thus had not erred in his reading, understanding, effect and applicability of article 11 of the UNCITRAL Rules and s. 14 of the AA. (paras 152, 153 & 163)

(8) The grounds of decision of the SCJ revealed that the SCJ had carefully evaluated the evidence given by the defendant and had given his reasons why the evidence of the prosecution ought to be preferred. There was no merit in the appellant's contention that, apart from evaluating the evidence regarding the authenticity of the email, the SCJ had merely summarised the defence evidence without re-evaluating it against the prosecution evidence. A perusal of the grounds revealed that the SCJ had conducted a re-evaluation of the prosecution case when viewed in the light of the defence evidence at the conclusion of the whole case. (paras 165, 171 & 172)

(9) There were a series of e-mail communications between SP8 and SP11 with the appellant through his email addresses opera@pc.jaring.my and george@jmr.com.my. Section 114A(2) of the EA provides that a person who is registered with a network service provider as a subscriber of a network service on which any publication originates from, is presumed to be the person who published the publication. The e-mails, which were also classified as documents under s. 3 of the EA and had also fulfilled the requirements of documents produced by a computer in accordance with s. 90A of the EA, also fell under the ambit of s. 114A of the EA. Further, the evidence clearly showed that the email accounts were registered in the name of the appellant and were still active at the material time. Hence, the presumption under s. 114A(2) of the EA arose against the appellant and the appellant had failed to rebut the presumption on a balance of probabilities that he was the owner of the e-mails. The unrebutted presumption showed that the relevant emails were genuine. There was no necessity for Metadata evidence to be adduced. (paras 175, 182, 183, 190, 209 & 210)

(10) The SCJ found that the exhibits analysed by SD3, the expert on behalf of the defence, was contaminated and compromised and stated that he was more predisposed to accepting the expert report given by SP5, the expert for the prosecution, as the expert report of SP5 was done according to the standard operation procedure of the Cybersecurity Malaysia. It was found that SD3 did not have any expertise in the area of forensic digital analysis as his area of expertise was more in the field of IT security which was quite different for the subject matter at hand. (paras 220, 227 & 228)

(11) The offence committed by the appellant was serious in nature. The actions of the appellant had compromised the integrity of the process by which arbitrators are appointed. Thus, some form of custodial sentence was merited. However, the age of the appellant was an influencing factor in punishment as was the fact that the appellant was a first offender. Therefore, the term of imprisonment was reduced, from six months to one month. However, the fine was increased from RM20,000 to RM50,000, in default, one year imprisonment. (paras 249 & 250)

Case(s) referred to:
Abdullah Zawawi Omar v. PP [1985] 2 CLJ 2; [1985] CLJ (Rep) 19 SC ***(refd)***
Mohd Khir Toyo v. PP [2015] 8 CLJ 769 FC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 20; [1987] CLJ (Rep) 221 SC ***(refd)***
Rogayah Che Mat v. PP [2001] 1 CLJ 230 HC ***(refd)***
Sabarudin Non v. PP & Other Appeals [2005] 1 CLJ 466 CA ***(refd)***
Tong Seak Kan & Anor v. Loke Ah Kin & Anor [2014] 6 CLJ 904 HC ***(refd)***

Legislation referred to:
Arbitration Act 2005, s. 14(1)
Criminal Procedure Code, ss. 156, 422
Evidence Act 1950, ss. 3, 90A, 114(g), 114A(2), 133
Penal Code, ss. 415(b), 417

Other source(s) referred to:
Ratanlal & Dhirajlal's Law of Crimes, 27th edn, pp 2678 & 2695

For the applicant - Alex De Silva, Amer Hamzah, Joshua Tay & Quek Yiing Hue; M/s Bodipalar Ponnudurai De Silva
For the respondent - Gan Peng Kun & Amira Sariaty Zainal; DPP

Reported by S Barathi

JUDGMENT

Collin Lawrence Sequerah J:

Introduction

[1] The appellant, Yusof Holmes bin Abdullah in Criminal Appeal No: 42(S)-8-01-2017, was charged with the following in the Kuala Lumpur Sessions Court:

> Charge under section 417 of the Penal Code
>
> Bahawa kamu pada 25 Januari 2010 di Kuala Lumpur Regional Centre of Arbitration (KLRCA), di dalam Wilayah Persekutuan Kuala Lumpur, telah menipu Pengarah KLRCA iaitu dengan memperdaya KLRCA untuk mempercayai bahawa "Statement of Independence" bertarikh 18 Januari 2010 yang kamu tandatangani adalah benar dan dengan itu telah dengan sengaja mendorong Pengarah KLRCA untuk melantik kamu sebagai penimbang tara dalam pertikaian di antara JMR Construction Sdn Bhd dengan NCWEB Changjiang Waterway Engineering Bureau, yang mana sekiranya mereka mengetahui yang Statement of Independence" itu adalah tidak benar, mereka tidak akan melantik kamu sebagai penimbang tara dalam pertikaian tersebut dan oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 417 Kanun Keseksaan.
>
> Alternative Charge under section 199 of the Penal Code
>
> Bahawa kamu pada 25 Januari 2010 di Kuala Lumpur Regional Centre of Arbitration (KLRCA), di dalam Wilayah Persekutuan Kuala Lumpur di dalam satu perakuan iaitu "Statement of Independence" bertarikh 18 Januari 2010 yang dibuat oleh kamu berkenaan dengan timbang tara

di antara JMR Construction Sdn Bhd dengan NCWEB Changjiang Waterway Engineering Bureau, yang mana perakuan tersebut boleh diterima di sisi undang-undang sebagai keterangan mengenai sesuatu fakta yang menyentuh perkara yang material kepada tujuan "Statement of Independence" itu dibuat yang mana kamu mengetahui adalah palsu, dan dengan yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 199 Kanun Keseksaan yang boleh dihukum di bawah Seksyen 193 akta yang sama.

[2] The appellant claimed trial to both charges and after a full trial, was convicted for the offence under s. 417 of the Penal Code. The appellant was sentenced as a result to a term of imprisonment of six months from date of sentence ie, 5 January 2017 and imposed a fine of RM20,000 in default six months imprisonment.

[3] Being aggrieved with the decision, the appellant has filed an appeal ("42(S)-8-01/2017") against conviction and sentence, while the Public Prosecutor (PP) has filed a cross-appeal ("42(H)-7-01/2017") against the sentence passed against the appellant.

[4] For convenience, Yusof Holmes bin Abdullah will be referred to as the appellant while the PP will be referred to as the respondent in the course of this judgment.

Pertinent Facts

[5] The succinct and pertinent facts leading up to the charges being brought against the appellant were as follows.

[6] JMR Construction Sdn Bhd ("JMR") appointed Nanjing Changjiang Waterway Engineering Bureau ("NCWEB") as the sub-contractor for the "Works Design and Build for Reclamation Works for Parcel A1, A2 & B1 Jelutong", Penang on 23 September 2006. However, *via* letter dated 13 December 2008, JMR repudiated its contract with NCWEB.

[7] This led to NCWEB filing a claim against JMR regarding the said repudiation. JMR *via* letter dated 7 January 2010 (P4) then made an application to the Kuala Lumpur Regional Centre of Arbitration (KLRCA) to appoint an arbitrator to arbitrate the dispute. The said letter contained details of the dispute and stated the required qualifications of the prospective arbitrator to be appointed by KLRCA.

[8] The KLRCA offered the appointment as arbitrator to the appellant *via* letter dated 13 January 2010 (P5) and the appellant accepted the appointment as sole arbitrator for the said dispute *via* letter dated 18 January 2010 by affixing his signature on the letter of appointment (P6B) and statement of independence (P6C).

[9] NCWEB contested the appointment of the appellant as arbitrator and referred the case to court. However, the court refused the application of NCWEB and ordered that the said case be referred to arbitration before the appellant. JMR did not contest the appointment of the appellant as an arbitrator.

[10] The arbitration process commenced in May 2011 and continued until October 2012 when the final award was published, except on the issue of costs (D73). The final award was in favour of NCWEB wherein JMR was ordered to pay NCWEB the sum of RM22,364,477.70 together with interest, amounting to RM6,745,575.

[11] Pursuant to a complaint dated 27 March 2013, the Malaysian Anti-Corruption Commission (MACC) or SPRM officers confiscated two black coloured Dell laptops and one Samsung Galaxy tablet 10.1 which contained emails showing the existence of a prior relationship between the appellant and JMR's witnesses (notably SP11 and SP8) in respect of the arbitration proceedings. The relevant emails involved the email address george@jmr.com.my and veltsen-roget@inbox.com (exhs. P79 & P80).

[12] The appellant was investigated and subsequently charged on 25 July 2013.

Parties Submissions

Appellant

Defective Charge

[13] The appellant submitted that on the face of the charge, it had omitted to state an important ingredient of the offence of cheating under the second limb of s. 415 of the Penal Code ie, the causation element of the offence.

[14] It was also submitted that the charge also lacked the following particulars:

(i) how the alleged deception by the appellant had caused or would have likely to cause damage or harm;

(ii) the party who suffered the damage or harm namely, whether KLRCA, the parties to the arbitration, or any other person; and

(iii) what damage or harm was suffered by that person, whether to the body, mind, reputation or property.

[15] The appellant submitted that according to the wordings in s. 415(b) Penal Code relating to the definition of cheating, the person who was intended to be induced to do or omit to do a particular act must be the same person who was deceived by the accused person.

[16] The charge in this case alleged that the accused had deceived the KLRCA by signing the statement of independence which had induced the Director of KLRCA to appoint him as an arbitrator in the dispute between JMR and NCWEB.

[17] The charge went further to state:

> … yang mana sekiranya mereka mengetahui yang "Statement of Independence" itu adalah tidak benar, mereka tidak akan melantik kamu sebagai penimbangtara dalam pertikaian tersebut ...

[18] It was accordingly submitted that the complaint was twofold.

[19] Firstly, that the charge was ambiguous and vague as it was unclear which party was deceived in the appointment of the appellant since there were at least four parties stated in the charge, namely KLRCA, Director of KLRCA, JMR and NCWEB.

[20] Secondly, that the charge was bad for multiplicity as it suggested that KLRCA, JMR and NCWEB were capable of appointing the appellant as the arbitrator and that the offence had been committed against KLRCA, JMR and NCWEB.

[21] This, it was submitted, required separate charges to be brought against the appellant for each different party. As the defect related to an ingredient of the offence, it amounted to an illegality and was incurable under ss. 156 or 422 of the Criminal Procedure Code.

Misdirection On The Ingredients Required To Prove The Offence Of Cheating

[22] With regard to the omission to state the causation element of the offence, the appellant submitted that the offence of cheating under s. 415(b) of the Penal Code involved three elements, namely the *actus reus*, *mens rea* and causation.

[23] However, the charge against the appellant had failed to state the causation element of the offence and this had misled the trial judge and resulted in him misdirecting himself as to the necessary ingredients of the offence.

[24] It was submitted further that in his grounds of judgment, the learned Sessions Court Judge directed himself as follows:

> Berdasarkan peruntukan dalam seksyen 415 KK, elemen utama yang perlu dibuktikan oleh pihak pendakwaan adalah bahawa wujudnya unsur "penipuan", di mana dalam penerangan 1 dijelaskan penyembunyian fakta secara tidak jujur adalah satu penipuan menurut seksyen tersebut. Oleh yang demikian elemen yang perlu dibuktikan oleh Pihak Pendakwaan ialah:
>
> (i) OKT dengan sengaja menipu Pengarah KLRCA dengan memperdayakan KLRCA untuk mempercayai bahawa "Statement of Independence" adalah benar;
>
> (ii) OKT tahu bahawa representasi tersebut tidak benar dan satu pemerdayaan;

(iii) Pemerdayaan yang dilakukan oleh OKT telah mendorong Pengarah KLRCA untuk melantik OKT sebagai Penimbangtara;

(iv) Membuktikan OKT tidak akan dilantik sebagai Penimbangtara sekiranya Pengarah KLRCA mengetahui "Statement of Independence" tersebut tidak benar.

[25] It was submitted therefore that the learned Sessions Court Judge had failed to direct himself on an important ingredient of the charge, ie, whether KLRCA, so deceived into appointing the appellant as an arbitrator, had caused or likely to have caused any damage or harm in respect of bodily, mind, reputation or property to any person.

[26] It was submitted by the appellant that although there was a reference in the grounds of judgment where the learned Sessions Court Judge (SCJ) alluded that the act of the appellant had caused reputational damage to KLRCA, such statement was merely a fleeting comment which was not supported by evidence.

[27] During the trial, there was no evidence led by the prosecution to show that any of the parties had suffered any form of harm or damages as a consequence of the alleged deception by the appellant.

No Deception Or Inducement On KLRCA With Regards To The Appointment Of The Accused

[28] The appellant submitted there was no deception or inducement committed on KLRCA. This was because the appointment of the appellant as the arbitrator was done prior to the statement of independence.

[29] Based on the evidence, the decision to appoint the appellant as the arbitrator had been made as early as 8 January 2010 when the Director of the KLRCA, SP1, minuted on JMR's letter requesting for the appointment of an arbitrator (P4) to appoint the appellant.

[30] It was submitted by the appellant that the oral testimony of SP1 was clear in that during the process of appointment, her decision to appoint the appellant was not influenced by the conduct of the appellant in submitting the statement of independence but was motivated by the expertise, competency, integrity and reputation of the appellant.

[31] The appellant submitted that the official letter of appointment (P7) was issued and signed by SP1 on 13 January 2010, well before the submission of the statement of independence by the appellant on 18 January 2010.

[32] The appellant submitted further that the statement of independence (P6(C)) signed by him was not false. Based on the evidence, the appellant had only dealt with the Director of JMR (SP11) on several occasions, the last one being merely to help and introduce SP11 to an executive of Jurutama to sort

A out the dispute between JMR and Jurutama. At all times, the appellant did not render any advice to SP11 in respect of the dispute between JMR and NCWEB.

[33] The appellant still further submitted that prior to signing the statement of independence, he had undertaken a four-point test (proximity, intensity, B dependency and impartiality) in assessing whether there was "apparent bias" or any facts which may impugn his independence and impartiality.

[34] It was submitted therefore that the appellant had gone through a deliberation exercise to satisfy himself as to the declarations contained in the statement of independence before proceeding to sign it. C

[35] The appellant submitted that the test employed by the appellant was the same test applicable in Malaysia for a judge to determine whether he/she should recuse from hearing a particular matter.

[36] Therefore, drawing an analogy to a case where a judge refuses to D recuse himself as he/she thought there was no apparent bias on their part, it was submitted that such a judge could not be held liable for an offence if it was shown that in the circumstances he/she ought not to have recused him/herself.

E **[37]** In any event it was submitted, at the conclusion of the arbitration, the appellant had granted the final award in favour of NCWEB. This was contrary to the allegations made by SP11. To the contrary, the final award to NCWEB showed the motive and malicious intent on the part of SP11 to level allegations against the appellant, in order to set aside the award. All of these were not considered by the SCJ.

F

Failure To Conduct Maximum Evaluation Of The Prosecution Evidence, In Particular The Evidence Of SP11

[38] The appellant submitted that SP11 had ulterior motive to concoct and fabricate allegations of fraud and corruption against the accused in order to G set aside the final award made against JMR by the appellant.

[39] It was also submitted that SP11 had appointed the appellant as an advisor in the dispute between JMR and NCWEB. JMR was the company in which SP11 previously held a directorship.

H **[40]** SP11 had also made payments pursuant to the advisory services rendered by the appellant for a sum of about RM120,000, engaged in constant communication between him and the accused mainly *via* emails and used different email accounts to communicate with him.

[41] It was finally also submitted that SP11 had received advice and I instructions from the appellant in respect of the arbitration between JMR and NCWEB, where the latter had helped him to draft a letter to NCWEB and KLRCA.

[42] It was therefore contended that this affected the credibility of SP11 as a witness and also made him an accomplice in the act of the appellant.

Failure To Re-evaluate The Evidence At The End Of The Trial

[43] Learned counsel for the appellant submitted that the SCJ had merely summarised the testimony of the accused without conducting a proper analysis of the defence evidence and testing it against the prosecution's.

[44] It was also submitted that the SCJ had only made a passing remark that the version of events, offered by the appellant was similar to the submission made by the defence counsel at the end of the prosecution case.

[45] It was contended further that the SCJ had dealt with the elements of the offence by relying only on the evidence of the prosecution witnesses without any consideration of the defence evidence, especially that of the appellant and SD2.

[46] It was therefore submitted that the SCJ had adopted wholesale the evidence of the prosecution witnesses without performing a maximum re-evaluation of all the evidence.

Authenticity Of The Emails, No Metadata Evidence And The Rejection Of SD3's Report

[47] The appellant submitted that although there were two expert reports in this case, one produced by SP4 for the prosecution which was marked as exh. P11 and the other by SD3 for the appellant, marked as exh. D97, the SCJ preferred SP4's evidence because he doubted the technique employed by SD3 in carrying out the "test" in writing the report, exh. D97, which the SCJ concluded may have contaminated the test results.

[48] It was submitted that this conclusion by the SCJ was seriously flawed because even if it was accepted that the finding that the "test" carried out by SD3 was not pursuant to the "international standards", this does not automatically render exh. D97 as inadmissible or mean that SD3's evidence was not to be considered at all.

[49] This is because there were two aspects to SD3's report, namely the practical aspect and the Metadata theory pertaining to the purported "emails".

[50] It was therefore submitted that even if the "test" conducted by SD3 was flawed, it would at best affect the first aspect of exh. D97. This does not and cannot affect the other aspect of exh. D97, which is the theoretical part of the report which deals with "Metadata". That part remains unaffected and unharmed by the finding that SD3's method's in conducting the test was flawed.

[51] It was submitted that without Metadata, there was no way to confirm whether there was in existence any genuine emails.

Respondent

[52] The essence of the respondent's submission is that the SCJ did not err in deciding that based on the facts, evidence and law the respondent had established a *prima facie* case against the appellant under s. 417 of the Penal Code.

[53] It was submitted that all the elements under s. 415 Penal Code had been proven as follows:

(i) The appellant made a false representation through the "statement of independence" (P6C) to the Director of KLRCA (SP1);

(ii) The appellant was aware that the representation was false;

(iii) The appellant submitted the said false representation with the intention of deceiving SP1; and

(iv) The appellant deceitfully induced SP1 to appoint the appellant as the arbitrator in the dispute between JMR and NCWEB which without the said deceit through the appellant's false representation, SP1 would have not appointed the appellant as the arbitrator.

[54] It was submitted that the appellant had made the false representation through the "statement of independence" (P6C) to the Director of KLRCA (SP1) ie, that the appellant was independent and had no interest or conflict with any party in the dispute between JMR and NCWEB, when in fact, the appellant had a relationship of interest with JMR before P6C was issued.

[55] It was also submitted that the appellant was also under the duty to disclose his impartiality and independence pursuant to article 11 of the UNCITRAL Arbitration Rules which had been adapted and adopted under s. 14 of the Arbitration Act 2005.

[56] The appellant, it was submitted, was aware that the said representation was false. The appellant was JMR's advisor when the dispute arose between JMR and NCWEB well before the appointment of the appellant as an arbitrator in the said dispute between the same parties.

[57] The appellant had in fact drafted the letters from JMR to KLRCA for the appointment of an arbitrator. In other words, the appellant was not an independent person as he had an interest with one of the parties to the dispute, ie, JMR.

[58] It was further submitted that there was a series of email communications (P41) between the appellant, SP11 and SP8 through both the appellant's email addresses (opera@pc.jaring.my and george@jmr.com.my) involving the dispute between JMR and NCWEB wherein the appellant had provided advisory consultation as to what steps were to be taken by JMR against NCWEB.

[59] Further, the email communication between SP11 and the appellant through the email address of george@jmr.com.my contained the draft letters and amendments to the said letters of P1 and P4 as evidenced in P64, P65 and P66.

[60] SP1 also informed the court that she was convinced that the appellant was independent and impartial at the time of appointment as the appellant had affixed his signature on the said statement of independence which was a material document relied on by SP1 in appointing the appellant. Without P6C, SP1 said she would have never appointed the appellant.

[61] The respondent further submitted that there was no need to prove harm caused to SP1 arising from the deceitful actions of the appellant.

[62] It was submitted nonetheless that SP1 had suffered serious harm to her reputation as the Director of KLRCA due to the allegation of her colluding with the appellant in appointing a non-independent arbitrator.

[63] Under all the circumstances, the respondent submitted that the prosecution had successfully made out a *prima facie* case against the appellant.

[64] The respondents submitted that the appellant's defence was merely a bare denial and he had failed to raise any reasonable doubt in the respondent's case.

[65] The respondent submitted that the appellant had failed to rebut the presumption under s. 114A(2) of the Evidence Act 1950 that he was the owner of the emails opera@pc.jaring.my, opera83@streamyx.com, veltsen-roget@inbox.com, and arbitration@yyresorts.com.

[66] This was because there was no denial but rather an admission of the usage and ownership of all the three emails (george@jmr.com.my, opera@pc.jaring.my, and arbitration@yyresort.com).

[67] Further, during cross-examination the appellant admitted that JMR and KLRCA only knew of the two email addresses (opera@pc.jaring.my and arbitration@yyresort.com) belonging to the appellant as stated on the letterhead (P6) prepared by the appellant himself.

[68] The appellant admitted that both the email addresses (opera@pc.jaring.my and opera83@streamyx.com) were contained in the chain of email correspondences (P41).

[69] Although the appellant stated that he never gave his email address opera83@streamyx.com to JMR, the question then arises as to how these emails appeared in the chain of emails (P41) as adduced by SP11 unless it was the appellant himself who sent P41.

[70] Further, through the evidence of SP5 from Jaring, it was established *via* P34, P35 and P36 that these said email accounts were registered in the name of the appellant and were still active and functioning at the said material time ie, August to December 2008.

[71] The appellant also failed to rebut the evidence that the owner of the email accounts of opera@pc.jaring.my and george@jmr.com.my is the same person.

[72] The appellant had also failed to explain the existence of the email (P28) sent *via* veltsen-roget@inbox.com in his personal computer as extracted by SP4 from Cybersecurity from the appellant's laptop hard disc (P15A and P15B) as seized by the Malaysian Anti-Corruption Agency or Suruhanjaya Pencegah Rasuah Malaysia (SPRM) at his home in Kuantan.

[73] The respondent submitted that SD3 was only an expert in Information Technology (IT) security and not an expert in Digital Forensic Analysis. It was also submitted that SD3 had only one certificate in Digital Forensic Analysis GIAC Forensic Examiner (GCFE-SANS) USA and had yet to complete two more levels of certification before he was considered competent.

[74] SD3 also failed to carry out analysis of the exhibits in accordance to the standard operating procedure (SOP) adopted by the international community of computer analysers in that he failed to use anti-static wrappers and anti-static mat to ensure the exhibits were not exposed to the 'electro-magnetic field'. SD3 had thus failed to take the necessary precautions to ensure the integrity of the said exhibit.

[75] The SCJ was therefore correct in rejecting the testimony of SD3.

[76] The respondent contended that Metadata evidence was unnecessary to determine the guilt of the appellant as there was direct evidence from the witnesses themselves that the appellant had sent those emails.

[77] Under all the circumstances, the conviction of the appellant was therefore safe.

Analysis And Findings

Defective Charges

[78] The offence under s. 417 of the Penal Code reads:

> 417. Punishment for cheating
>
> Whoever cheats shall be punished with imprisonment for a term which may extend to five years or with fine, or with both.

Cheating itself is defined in s. 415 of the Penal Code as follows:

> 415 Cheating
>
> Whoever by deceiving any person, whether or not such deception was the sole or main inducement:
>
> (a) fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property; or

(b) intentionally induces the person so deceived to do or omit to do anything which he would not do or omit to do if he were not so deceived and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation, or property,

is said to "cheat".

[79] While it is evident that there are three parties mentioned in the charge, an overall reading of the charge will leave one in no doubt that the party who was stated to have been deceived was the Director of the Kuala Lumpur Regional Centre for Arbitration ("KLRCA").

[80] Under all circumstances, it was only the Director of the KLRCA who had the power to appoint the appellant as arbitrator. JMR and NCWEB had no such power and besides the charge was clear that they were the parties to the dispute.

[81] Therefore, the use of the phrase "mereka tidak akan melantik ..." or "they would not have appointed ..." had clearly referred to the said director (SP1) and not to any of the other parties mentioned in the charge.

[82] It is also evident from a reading of the charge that the said director (SP1) would not have appointed the appellant as arbitrator in the arbitration proceedings referred to if she were not induced by the appellant when he submitted the statement of independence indicating the absence of conflict.

[83] Therefore, under all the circumstances, there was no merit to the argument that the charge was bad for multiplicity. The appellant was also represented by learned and able counsel and the appellant cannot be said to have been misled in any manner.

[84] With respect to the omission to state the damage or harm to any person in body, mind, reputation, or property in the charge, I tend to agree with the respondent that this is not fatal to their case.

[85] *Ratanlal & Dhirajlal's Law of Crimes* (27th edn at p. 2678) states the following:

S. 415

This section requires:

1 Deception of any person.

2 (a) Fraudulently or dishonestly inducing that person:

(i) to deliver any property to any person, or

(ii) to consent that any person shall retain any property, or

(b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

[86] In *Rogayah Che Mat v. PP* [2001] 1 CLJ 230 at p. 238, it was held:

> At the onset I must state that s. 415 is a definition and not a substantive section under which a person may be charged (Penal Law of India vol. Iv Dr. Sir Hari Singh Gour PP. 3516 and 3524). Section 417 punishes simple cases of cheating (*Laws of Crimes* by Ratanlal) as compared to s. 420 which is reserved for more serious cases, particularly where delivery of property has taken place, or other outcomes as specified in the latter section have been established. So long as the prosecution can prove that:
>
> (a) the representation made by an accused person is false;
>
> (b) the accused knew that the representation was false at the very time it was made;
>
> (c) he made the false representation with the dishonest intention of deceiving the person to whom it was made; and
>
> (d) he thereby induced that person to deliver any property or to do or to omit to do something which he would otherwise not have done or omitted

[87] A perusal of the charge will reveal the following:

(i) The appellant had submitted a false representation, *to wit* a "statement of independence" (P6C) to the Director of the KLRCA (SP1);

(ii) The appellant knew that the representation was false;

(iii) The appellant made the false representation with the intent to deceive SP1; and

(iv) The appellant deceived SP1 in order to appoint himself as arbitrator in the dispute between JMR and NCWEB where were it not for the deception through the representation, SP1 would not have appointed the appellant as arbitrator.

[88] It is clear therefore that the charge had stated with clarity the essential ingredients of the offence and was clear as to what the offence alleged against the appellant was.

[89] There was nothing to indicate that the appellant was confused or misled by the charge.

[90] In *Mohd Khir Toyo v. PP* [2015] 8 CLJ 769; [2015] 5 MLJ 429, the Federal Court speaking through Jeffrey Tan FCJ held:

> There was no defect in the charge. There was no error or omission either in the ingredients of the offence or in the particulars of it. It was not shown that the appellant was materially misled or that a miscarriage of justice had occurred. All the required ingredients of the offence were clearly stated in the charge.

[91] Similarly, here, there was nothing in the evidence to show that a miscarriage of justice was occasioned by the omission to state the damage or harm to any person in body, mind, reputation, or property in the charge.

[92] There was no merit therefore to the submission by the appellant that the charge was defective. The learned Sessions Court Judge ("SCJ") had thus not misdirected himself.

Misdirection On The Ingredients Required To Prove The Offence Of Cheating

[93] This submission follows from the previous section and rests upon the allegation that the charge failed to state the causation element which is that the act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation, or property.

[94] The commentary in *Ratanlal & Dhirajlal's Law of Crimes* (27th edn at p. 2695) itself states that the illustrations in the section throw no light on what is meant by damage or harm to any person in body, mind, reputation, or property.

[95] The charge clearly states that where were it not for the deception through the representation, SP1 would not have appointed the appellant as arbitrator. This was clear enough to communicate to the appellant the nature of the particular act of cheating.

[96] Here again, it is difficult to see how this omission could have prejudiced the appellant or misled him in conducting his defence in any manner. There was no miscarriage of justice occasioned.

[97] The appellant submitted that there was no evidence adduced apart from what the SCJ stated regarding loss of reputation. However, the very wordings in s. 415 itself state that "the act or omission causes **or is likely to cause** damage or harm to any person in body, mind, reputation, or property". (emphasis added)

[98] Therefore, it was not necessary that damage to reputation must actually be proven. The likelihood of such occurrence is sufficient. This likelihood as a matter of logic and common sense can only be discerned by way of inference from the circumstances of the case and can rarely, if ever, be proved by direct evidence.

[99] The likelihood of damage to the reputation of the KLRCA occurring as a result of the act of deception performed by the appellant is therefore something that can reasonably be inferred from the circumstances of the particular case.

[100] I find no merit therefore in the submission raised by learned counsel for the appellant in respect of this issue.

No Deception Or Inducement On KLRCA With Regards To The Appointment Of The Appellant

[101] This ground rests upon the submission that the appointment of the appellant as arbitrator was made prior to the issuance of the statement of independence.

[102] This is because it was submitted that the decision to appoint the appellant as arbitrator was made on 8 January 2010 when the Director of the KLRCA (SP1) minuted on JMR's letter requesting that the appellant be appointed as arbitrator.

[103] It was submitted by the appellant that the SCJ had also erred when he made the finding that the appointment of the appellant as arbitrator was not made through P5 dated 13 January 2010 as it was just a letter of offer and not an appointment.

[104] An examination of the evidence of SP1 however reveals the following:

Q: So at this point, is Yusof Holmes already appointed or not?

SP1: No Tuan. This letter signed by Olivia is, is an offer actually. Is an offer for him to accept the appointment by me.

Q: And if such appointment is accepted by Mr. Yusof Holmes, what is he to do?

SP1: He is to, if he accept the offer then he would have signed the letter of appointment and statement of independence.

[105] SP1 also testified as follows:

Q: Yes. And one last question Dato', this I would like to refer to P6 (c) ya. statement of independence. Ok. This Mr. Cheow Wee had pointed to the two limbs in this particular document. What is the relevance and weight of this document?

SP1: I would say without the signature of the arbitrator then we would not be proceeding with the appointment. I mean we would not allow the arbitrator to proceed with the arbitration hearing.

Q: If Yusof Holmes had not signed these two documents, these letter of appointment and statement of independence, would have appointment take in place?

SP1: No. Because then, then we would, since this is why we asked him to return two copies ya. So it is only, normally we would inform the parties that he is reported and we will give the parties a copy of those documents. So if we do not receive in, within a reasonable period then we would appoint somebody else and inform the parties accordingly.

[106] It is obvious from SP1's testimony that P5 was not a letter of appointment but a conditional letter of offer.

[107] During cross-examination, SP1's testimony was consistent with her testimony given in-chief. This can be gathered from the following excerpt:

Q: Mr. Yusof Holmes when he returns the acceptance and also the statement of independence was purely a formality for the purpose of his appointment as stated in your letter. Look at your letter in, on P4 I believe. The letter by, P5, P5. Let me start again Dato'. Maybe that is too much to ...

P1: Yes

Q: Put. Digest the stuff. We went through the steps of appointment just now. Olivier has spoken to Mr. Yusof Holmes. And Mr. Yusof Holmes has indicated he is willing and able and then Olivier sends out this letter referring to the tele-conversation and also saying that please, here it is. Based on our conversation you have been appointed. Sign it and send it back to us for our records. Look, look at the letter Dato' on the first paragraph. Is this for our records? So I am suggesting to you Dato' is actually a formality at the end of the day. The appointment has been made by you Dato'.

P1: No I disagree again.

Q: Ok.

P1: Yes. Do you want me to say why?

Q: No you may, yes I think the Court want to listen to your reasoning.

P1: Because as you can see, I, I believe I said yesterday that Oliver's letter is an offer. And so to me that the, the second limb of the last paragraph that is the part that takes place 'if for any reason they are not able to do so please let us know immediately or in the alternative you may decline this proposal to appoint you'.

[108] Further on during cross-examination, SP1 said:

Q: Yes.

SP1: No I meant was Olivier's letter was the offer.

Q: Yes. And there is nothing in the letter which says that it was conditional as well Dato', correct? There is no on condition, on condition, condition tak ada. Tak ada syarat-syarat?

A: Perhaps it is a wrong wording but our intention was the wording 'If for any reason' that is supposed to be the condition.

[109] SP1 in re-examination reaffirmed that P5 was a conditional letter of offer as evident from the following:

Q: So in your, so is this letter this P5 is this a letter of, has appointment taken place?

P1: No not yet.

Q: What is this letter then?

P1: It is just an offer for me to appoint the Arbitrator.

[110] The above would leave no doubt that as far as SP1 was concerned, P5 was a mere conditional letter of offer and did not have the effect of appointing the appellant as arbitrator at that point of time.

[111] It was contended by the appellant that the SCJ had erred in his interpretation of the contents of P5 when he held that the appellant had to make a disclosure whether by way of telephone, email, or letter regarding his interest and/or any conflict with any parties based upon the following statement:

A This appointment is made on the understanding that you have sufficient time to spend on the matter so that the proceedings would be smoothly and that the matter would be settled expeditiously. If for any reason you are not able to do so please let us know immediately or in the alternative, you may decline the proposal to appoint you.

B **[112]** This finding however, on the part of the SCJ was based upon the following testimony by SP1:

Q: So in this case it is Yusof because the letter is address to Mr. Yusof Holmes?

SP1: Yes, yes, yes. Mr. Yusof Holmes. Earlier on she would, she
C referred to the telephone conversation and talk about who are the parties and telling him under what law the, the arbitration has to be conducted and the last paragraph actually is an important paragraph. Because it states here 'this appointment is made on the (*sic*) understand that you have sufficient time to spend on the
D matter so that the proceedings, proceedings would be conducted smoothly and that the matter would be settled expeditiously'. Just to ensure it is fast. And the next, the, the, the limb, the second limb to the paragraph is 'if for any reason you are not able to do so please let us know immediately or in the alternative you may decline the proposal to appoint you'.

E Q: The first thing is, if he got sufficient time to hear the matter?

SP1: Yes.

Q: And second if there are any other reasons?

SP1: Yes.

F Q: To you Dato', and to KLRCA what would this any other reasons be?

SP1: To ensure that there is no, I mean like if there is any form of conflict of interest he has to decline.

G Q: Now, referring to paragraph which you have read earlier ya, if Mr. Yusof Holmes in particular has got any interest in this dispute how can this interest be conveyed to KLRCA?

SP1: Then he would have to tell us, I mean in whatever way of communication that he knows or he has interest whatsoever with the parties or in the matter and then he should not have accepted
H the letter of appointment. And then more importantly he cannot sign the statement of independence because he then would not be independent.

[113] The respondent submitted that the issue raised regarding the need to make a disclosure by the appellant with respect to P5 was a mere afterthought
I because counsel for the appellant had not availed himself of the opportunity to cross-examine SP1 on this issue. The appellant had instead merely confined himself to cross-examining SP1 on the issue of P5 constituting a conditional letter of offer.

[114] I tend to agree with the stand adopted by the respondent in this respect and the failure of the appellant to challenge SP1 in this respect must be taken as an acceptance of her testimony on that issue.

[115] It was also clear from the evidence that the appellant was appointed as arbitrator only after the appellant had signed and forwarded the statement of independence (P6C) dated 18 January 2010.

[116] In the premises, I find no merit to the argument raised by the appellant in respect of this issue.

[117] Learned counsel for the appellant also submitted that the statement of independence (P6C) signed by the appellant was not false. This is because according to the evidence, the appellant had only dealt with SP11 on several occasions the last of which to merely assist and introduce SP11 to an executive of Jurutama in order to settle the dispute between JMR and Jurutama.

[118] The appellant had not therefore rendered any advice to SP11 in respect of the dispute between JMR and NCWEB, it was argued.

[119] The testimony of the appellant, however, under cross-examination is as follows:

TPR: You are known to Dato' Goh as Leslie, your English name, is that correct?

SD1: Yes, when I first met him it was before I converted to Islam, which was

TPR: And during that meeting there was also another person by the name of Chong Siew Tat. Is that correct?

SD1: Correct.

TPR: Now, after telling you that.. Of the problems that JMR is facing, it was asked by Dato' Goh whether you were willing to act as advisor to the dispute between ... an advisor to JMR?

SD1: Correct

TPR: Agree that based on the email, Mr Holmes, that the dated as captured by the email is after your meeting with Dato' Goh on October 2008?

SD1: The (*sic*) dated on these documents are November 2008 after the meeting with Dato' Goh.

[120] The testimony of SP11 shows as follows:

TPR: This disputes that now JMR Constructions faces with Nanjing, did you engaged any advisor?

SP11: I engaged him as the advisor.

TPR: Who?

SP11: Leslie Holmes, advisor for this project.

[121] The evidence of SP11 also shows the following:

TPR: How did you appoint as advisor, is there any letter of appointment?

SP11: Verbally, when I saw him in KL, then he accepts to act as an advisor.

TPR: You said you met him in KL. Do you remember where?

SP11: I remember in KL Sentral, lobby of the Hilton Hotel, KL Sentral.

TPR: When did this meeting took place?

SP11: I think somewhere end of 2008.

TPR: What was discussed in this meeting?

SP11: During the meeting I ask him whether he is willing to act as advisor for this project, involve arbitration, dispute between us and Nanjing.

TPR: What was his reply?

SP11: He said yes. Can I highlight a bit more, I ask him about the fee because what I understand is before it was RM1000 per day but he said now the price increase a lot but we have not mention about the price, he only mention the price will be very much different.

...

TPR: Pohon rujuk saksi kepada P17. You just go through this letter. Is this the letter which you have written to Nanjing expressing your intention to start an arbitration process?

SP11: Yes, correct.

TPR: To whom did you CC copy this letter to?

SP11: To Dato' Norashikin Binti Tan Sri Abdul Rahim, KLRCA.

TPR: Can you tell us about the content of this letter?

SP11: We suggest to Nanjing our dispute is best (*sic*) refer to the arbitration and also get KLRCA to appoint an arbitrator.

TPR: Did you draft this letter Dato'?

SP11: No, Leslie Holmes helps me to draft it.

TPR: Speak louder because we need to record your answers. My question is did you draft this letter?

SP11: Content of the letter Leslie Holmes helps me to make the draft.

TPR: Refer to the last paragraph of the letter, taking into consideration the nature of the dispute until the end, appoint for our consideration. Who set this requirement for this qualification for an arbitrator?

SP11: This one draft by Leslie Holmes mention in the letter we prefer to get a person with this sub qualification like civil engineering background and arbitrator dealing experience and also prefer to be a chartered arbitrator from UK. That is what we express our intention to KLRCA. That is the qualification we prefer.

TPR: Pohon saksi dirujuk P4. You just go through this letter.

SP11: I know the content.

TPR: Can you tell the court what is this letter about?

SP11: The letter about, hopefully the KLRCA to appoint an arbitrator in the matter of dispute.

TPR: In this letter did you state the qualification which the arbitrator is to possess?

SP11: Yes. In this letter also we mention, we hopefully can get a person with professional qualification in the civil engineering who has the extensive experience in the arbitrating during with soil beginning.

TPR: Is it reflected anywhere in the letter, where?

SP11: In the fourth paragraph.

TPR: This letter is sign by you?

SP11: Yes.

TPR: Did you prepare this letter?

SP11: No, Leslie Holmes helps me to prepare the draft.

TPR: How did he help you to prepare the draft letter?

SP11: Through the email.

[122] An examination of the above evidence displays some measure of consistency between the evidence of the appellant and SP1 in this respect and all of this points to the fact that the appellant was engaged as advisor to the dispute between JMR Construction and Nanjing. The evidence of SP11 further discloses that it was the appellant himself who prepared the draft of the letter to be sent to the KLRCA.

[123] SP11 was the former manager of JMR and was its advisor. SP11 knew the appellant for more than 20 years as the latter had acted as advisor to JMR. At the end of 2008 (October), SP11 together with Chong Siew Tat (SP8) had met with the appellant at the Hilton Hotel, KL Sentral.

[124] After the said meeting, the appellant agreed to act as advisor to JMR in the termination of the contractual dispute between JMR and NCWEB. The testimony of SP11 had also disclosed that the appellant had charged a fee for acting as advisor. SP11 had also confirmed that JMR had paid a fee to the appellant for this role in the sum of RM123,480 paid over two installments on 25 May 2010 and 25 June 2010 respectively.

[125] After the said meeting, the appellant had regularly communicated with SP11 and SP8 through telephone and email, initially using the email address of opera@pc.jaring.my.

[126] SP11 further said that the appellant had requested that a special email be created under JMR in order to facilitate the communication between them. To this end, a new email address was created, namely, george@jmr.com.my.

[127] It was also in evidence that it was the appellant who assisted SP11 in drafting the letters (P1) and (P4) that were sent to the KLRCA to request that arbitration proceedings be commenced relating to the dispute between JMR and NCWEB.

[128] Chong Siew Tat (SP8), testified that he had met the appellant at the Hilton Hotel, KL Sentral towards the end of 2008 and also confirmed that he was in constant communication with the appellant through email using the address opera@pc.jaring.my.

[129] Lim Tze Ming (SP9), was the accountant at JMR and he confirmed that a fee was paid to the appellant in his capacity as advisor.

[130] The series of email communication between SP11 and SP8 with the appellant through the email addresses of opera@pc.jaring.my. and george@jmr.com.my. was with respect to the issue of the dispute between JMR and NCWEB and the appellant had given advice on the course of action that should be taken by JMR against NCWEB.

[131] Besides all of this, there were a series of email communications between SP11 and the appellant using the email address of george@jmr.com.my. relating to the draft and amendments to the letters P1 and P3 and P4, as reflected in P64, P65 and P66.

[132] Although the motive behind SP11's role in the whole chain of events were questioned by the appellant because the decision in the arbitration had gone against SP11's company, and he had alleged fraud and corruption against the appellant in trying to set aside the arbitration award, this does not necessarily mean that SP11's testimony was untrue.

[133] It will be recalled that there were other witnesses who had corroborated the testimony of SP11 as alluded to above. It must also be borne in mind that the SCJ had the audio-visual advantage of these witnesses, something denied to this court. Coupled with this and based upon his assessment of the demeanour of the witnesses, he had made the finding that the testimonies of SP11, SP8 and SP9 were credible.

[134] Now, it is trite that this court cannot lightly interfere with such findings which were largely findings of fact save for good reason of which I find none here.

Failure Of The SCJ To Conduct A Maximum Evaluation Of The Prosecution Case, Was SP11 A Credible Witness And Was He Also An Accomplice?

[135] The appellant submitted that SP11 knew about the circumstances in the appointment of the appellant as arbitrator but he nevertheless concealed the fact of the prior dealings from NCWEB and KLRCA.

[136] It was also submitted that the award of arbitration went against JMR and there was a finding that there was fraudulent conduct on the part of SP11 and that the latter had amended the application to set aside the final award by inserting allegations of fraud and corruption against the appellant.

[137] As a result, it was submitted that SP11 had an ulterior motive against the appellant and that he ought to be considered an accomplice whose evidence required corroboration.

[138] In *Sabarudin Non v. PP & Other Appeals* [2005] 1 CLJ 466; [2005] 4 MLJ 37, the Court of Appeal held:

> In our judgment, the correct test for determining whether a witness is an accomplice is that laid down by Thomson CJ in *Chao Chong v. Public Prosecutor* [1960] MLJ 238:
>
> > The true question, however, was not the technical one of whether the witness could have been convicted for his participation in the offence if he had been prosecuted. *The true question was whether, having regard to his participation in the offence and having regard to all the circumstances of the case, his evidence was to be regarded with suspicion and as possibly so tainted as to invite if not to demand corroboration before it was accepted*. (emphasis added)

[139] Although SP11 had *inter alia*, amended the application to set aside the final award by inserting allegations of fraud and corruption against the appellant, this does not necessarily turn him into an accomplice.

[140] SP11 had a legitimate interest in applying to set aside the award against JMR. In the course of doing so, he may have made certain allegations but these were done with the sole intention of setting aside the award.

[141] In the final analysis, SP11 played no part in abetting the commission of the crime in this case, which was the representations made by the appellant in the statement of independence to the KLRCA. Under the circumstances, I do not find that SP11 was an accomplice.

[142] In any event, s. 133 of the Evidence Act 1950 also stipulates that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

[143] Moreover, the evidence of SP11 was corroborated by SP8 with regard to the material particular of the appellant's involvement with JMR in the arbitration dispute.

[144] As regards to the credibility of SP11 himself as a witness, the SCJ had the first hand opportunity to observe his demeanour and so was in the best position to ascertain his credibility. This is something not to be lightly interfered with save for good reason.

[145] Whatever his motives may have been, SP11 came across as a credible witness before the trial judge and I find no good reason to hold otherwise.

[146] As far as evaluating the evidence of the prosecution is concerned, a perusal of the grounds of judgment will indicate that the SCJ dealt extensively and comprehensively with the evidence and had thus conducted a maximum evaluation of the prosecution evidence before arriving at the decision that the prosecution had made out a *prima facie* case against the appellant.

[147] I find no merit therefore in the submissions of the appellant in respect of this issue.

Arbitrator's Obligations Under art. 11 United Nations Commission On International Trade Law (UNCITRAL), s. 14 Of The Arbitration Act 2005 And The Four-point Test Adopted By The Appellant

[148] The appellant submitted that the SCJ had erred in failing to take into account the testimony of SP1, to the effect that the appellant was not obligated under s. 14 of the Arbitration Act 2005 to disclose that he knew the parties involved in the arbitration.

[149] However, a perusal of the relevant portion of SP1's testimony reveals the following with regard to the applicability of article 11 of UNCITRAL which is almost similar, if not identical, to s. 14 of the Arbitration Act 2005:

> Q: So, how is this done by the Arbitrator? His mode of disclosure?
>
> SP1: He would either call or email or write, ya. Q: It is through a call or? SP: Email or write. Or some, some mode of actual communication, ya
>
> Q: Is there anything in the KLRCA Rules for the UNCITRIAL Arbitration Rules pertaining to this duty to disclose?
>
> SP1: That would be under Article 9 to 12 | think of the UNCITRAL Rules. I think it is Article 9.
>
> ....
>
> Q: Adakah terdapat apa-apa, sorry, is there any provisions in the UNCITRAL Rules pertaining to his duty to disclose and if there is, is there any provision, any such provision?
>
> SP1: Yes, yes. I am sorry I said Article 9, it is actually Article 11.
>
> Q: Article 11 the UNCITRIAL Rules?
>
> SP1: Ya.

Q: Dato' if you could read it out.

SP1: So when a person is approach in connection with his or her possible appointment as an Arbitrator he or she shall disclose any circumstances likely to give rise to justifiable doubt as to his or her impartiality or independence. An Arbitrator from time of his or her appointment and throughout the arbitral proceedings shall without delay disclose any such circumstances to the parties and the other Arbitrators unless they have already been informed by him or her of these circumstances.

Q: Now, you mentioned earlier about disclosure being made *via* a telephone call and email or, or ...

SP1: Letter.

Q: Through a letter. If such disclosure is made by a particular Arbitrator would KLRCA proceed with the appointment?

A: No. Definitely not.

[150] The content of SP1's testimony above clearly discloses the obligation upon someone in the shoes of the appellant to make disclosure pursuant to the UNCITRAL Rules.

[151] During the course of cross-examination, SP1 also testified with regard to s. 14(1) of the Arbitration Act 2005, the following:

Q: Seksyen 14, section 14(1) the first part of that Act Dato' it says 'A person who is approach in connection with that persons possible appointment as an Arbitrator shall disclose any circumstances, likely to give rise to justifiable doubts as to that partial, persons in partiality or independence.' These words is captured in this statement only, Independence. Correct Dato'?

SP1: Yes that is right.

Q: And those words if you look at it Dato', those words are in the first person, am referring in the first person's name. I am independent to the best of my knowledge.

SP7: Yes.

Q: Put. Right. And therefore Dato'! put it (*sic*) to you that when Mr. Yusof Holmes signed this statement of independence he believes that he is independent on the parties. And he intend to remain so in his believe. There is nothing wrong with that, do you agree with me Dato'?

SP1: Well, I would have expected him if he knows any of the parties just to disclose to me.

Q: You would have expected he disclose?

SP1: Ya.

[152] An examination of the testimony of SP1 above will clearly show that the appellant was under an obligation both by virtue of s. 14 of the Arbitration Act 2005 and article 11 of the UNCITRAL Rules to disclose that he knew the parties to the arbitration.

[153] The testimony adduced also showed that the appellant was well aware of such duties and the obligation upon him to disclose that he knew the parties.

[154] The appellant in their petition of appeal stated that the SCJ had erred in his reading, understanding and effect of article 11 of the UNCITRAL Arbitration Rules and s. 14 of the Arbitration Act 2005. This, it was submitted, was despite the fact that the appellant had adopted the four-point test.

[155] A reading of the grounds of judgment will show that the SCJ alluded to the evidence of SP1 who said that the disclosure that was required to be done by the appellant was contained in article 11 of the UNCITRAL Arbitration Rules as adapted and applied under s. 14 of the Arbitration Act 2005.

[156] Article 11 of the UNCITRAL Arbitration Rules states as follows:

> Article 11
>
> When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to **justifiable doubts** as to his or her impartiality or independence. An arbitrator, from the time of his or her appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties and the other arbitrators unless they have already been informed by him or her of these circumstances. (emphasis added)

[157] Section 14 of the Arbitration Act 2005 reads:

> Grounds for challenge
>
> 14. (1) A person who is approached in connection with that person's possible appointment as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence.
>
> (2) An arbitrator shall, without delay, from the time of appointment and throughout the arbitral proceedings, disclose any circumstances referred to in sub-s. (1) to the parties unless the parties have already been informed of such circumstances by the arbitrator.
>
> (3) An arbitrator may be challenged only if:
>
> (a) the circumstances give rise to **justifiable doubts** as to that arbitrator's impartiality or independence; or
>
> (b) that arbitrator does not possess qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by that party, or in whose appointment that party has participated, only for reasons which that party becomes aware of after the appointment has been made. (emphasis added)

[158] It will be noticed that both the above provisions ie, article 11 UNCITRAL and s. 14 of the Arbitration Act 2005, use the phrase "justifiable doubts". The respondent submitted that from the evidence, it was evident that the appellant displayed a clear understanding of the obligation to disclose impartiality or independence or lack of it, if one entertained justifiable doubts.

[159] The relevant excerpt of the evidence of the appellant under cross-examination in respect of s. 14 of the UNCITRAL Arbitration Rules states as follows:

TPR: Now, this duty to disclose if one has justifiable doubts, how can it be manifested in accordance to the Act?

SD1: Well, if a potential candidate feels that he is not independent and that he is not impartial, then it would be incumbent on him under subsection 14(1) to disclose. If the approach came from the director, it would be incumbent on him to disclose to the director.

TPR: Having taken all these four factors into consideration, as you mentioned earlier, would you agree that the arbitrator's role is akin to a judge or a referee, they have to be independent, impartial and has no conflict of interest?

SD1: Independent, yes. Impartial, yes. As to conflict of interest, I would have to examine each particular circumstance as a potential conflict.

TPR: But on the surface, they should not have any conflict of interest between the (), having the independence itself?

SD1: Well, I think independence and impartiality would take into account an absence of a conflict.

[160] In respect of s. 14 of the Arbitration Act 2005, the appellant's evidence is as follows:

TPR: And do you agree that the word 'justifiable doubts' is also available in Section 14 of the Arbitration Act?

SD1: 'Justifiable doubt'? TPR: Just look at justifiable doubts', is there ...

SD1: Is mentioned in subsection 14(3)(a).

TPR: So, do you agree that the words 'justifiable doubts' is mentioned in both the statement of independence as well as Section 14 of the Arbitration Act?

SD1: Yes

[161] A perusal of the evidence above will show that the appellant was fully aware of the obligation to disclose in the event of the existence of justifiable doubts.

[162] The appellant, as can be seen also, agreed that the phrase "justifiable doubts" is mentioned in the statement of independence as well as clearly borne out by the said statement of independence on 18 January 2010 signed by the appellant which stated as follows:

> I, the undersigned hereby declare that I accept to serve as Sole Arbitrator in the instant reference and I further declare that:
>
> 1. I am independent of the Parties and intend to remain so;
> 2. To the best of my knowledge there are no facts or circumstances likely to give rise to justifiable doubts as to my impartiality or independence.
>
> Date: 18th January 2010 Signed
>
> Yusof Holmes

[163] Under the circumstances, the SCJ had not erred in his reading, understanding, effect and applicability of article 11 of the UNCITRAL Arbitration Rules and s. 14 of the Arbitration Act 2005.

Failure To Re-evaluate The Evidence At The End Of The Trial

[164] The appellant contended that the SCJ had failed to re-evaluate the whole evidence at the conclusion of the whole trial apart from merely summarising the evidence of the defence.

[165] A perusal of the grounds of decision on the other hand, will reveal that the SCJ had carefully evaluated the evidence given by the defence and had given his reasons why the evidence of the prosecution ought to be preferred.

[166] In the process of doing so, it was clear from the grounds of judgment that he had evaluated the evidence of the defence against that given by the prosecution before coming to his respective findings.

[167] As an example, the SCJ had alluded to the denial of the appellant in the use of the email address of george@jmr.com.my. This was because according to the appellant, he had refused the offer by SP11 to act as advisor. The SCJ had thereafter made reference to the evidence of SP11 regarding the creation of the said email address and made a finding that the denial by the appellant was a bare denial because he held that the creation of the said email address could only be explained if the appellant had agreed to be the advisor to JMR.

[168] In fact, one of the main planks in the defence case was that the appellant had denied acting as advisor to the dispute between JMR and NCWEB as he was busy with other arbitration cases at the material time *inter alia*.

[169] Although the appellant agreed that he had met with SP11 and SP8 at the Hilton Hotel in KL Sentral sometime in October 2008, he denied having further communication with SP11 or SP8 thereafter. As part of his defence that he had not communicated with them, he denied sending emails to them.

[170] The authenticity or otherwise of the emails was therefore central to the defence case. Following from this, it was incumbent upon the SCJ to undertake an analysis of whether or not the emails raised by the prosecution was authentic or otherwise, which he did in some detail. In other words, a large part of the analysis of the defence case necessarily centered upon the authenticity of the emails.

[171] There was thus no merit to the contention by the appellant that apart from evaluating the evidence regarding the authenticity of the emails, the SCJ had merely summarised the defence evidence without re-evaluating it as against the prosecution evidence.

[172] In any event, a perusal of the grounds will reveal that the SCJ had also conducted a re-evaluation of the prosecution case when viewed in light of the defence evidence at the conclusion of the whole case.

The Authenticity And Ownership Of The Emails Between The Appellant And SP11

[173] It was submitted by the appellant that the report and evidence of SD3 relating to the Metadata evidence was unaffected. The Metadata evidence, it was submitted, was necessary in order to confirm whether the emails were genuine or not.

[174] The SCJ, it was further submitted, had ignored this part of the report (D97) from consideration. Without the Metadata evidence, the contention of the appellant was that the prosecution had failed to prove the authenticity of the emails namely, exhs. P10, P28, P29, P41, P64, P65, P66, P67, P68, P84, P85 and P86.

[175] There were a series of email communications between SP8 and SP11 with the appellant through his email addresses opera@pc.jaring.my. and george@jmr.com.my. as per exh. P41 which revolved around the issue of the dispute between JMR and NCWEB where the appellant had rendered advice regarding the actions that needed to be taken by JMR against NCWEB.

[176] In addition, there were also a series of email communications between SP11 and the appellant using the email address of george@jmr.com.my. relating to the draft and amendments of letters P1 and P4 as evidenced by P64, P65 and P66.

[177] The appellant also took the position that s. 114A(2) of the Evidence Act 1950 ("EA") relating to the presumption of fact in publication does not apply to emails.

[178] The said section reads:

114A. Presumption of fact in publication

(1) A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved.

(2) A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved.

(3) Any person who has in his custody or control any computer on which any publication originates from is presumed to have published or re-published the content of the publication unless the contrary is proved.

(4) For the purpose of this section:

(a) "network service" and "network service provider" have the meaning assigned to them in section 6 of the Communications and Multimedia Act 1998 [Act 588]; and

(b) "publication" means a statement or a representation, whether in written, printed, pictorial, film, graphical, acoustic or other form displayed on the screen of a computer.

[179] In *Tong Seak Kan & Anor v. Loke Ah Kin & Anor* [2014] 6 CLJ 904, the court held:

(2) *Confirmation by the service providers, Telekom Malaysia and TM Net, provided proof that the first defendant was the registered subscriber of the two blogs, automatically kicking in the presumption under s. 114A(2) of the Evidence Act 1950* ('the Act'), which was retrospective in effect. The legislative scheme of s. 114A(2) is merely to presume or pre-suppose that the registered owner of the blog is the publisher of the publication and the presumption is rebuttable by proof to the contrary. If a blog or website owner succeeds in proving that he is not the person who published the offending material then the presumption dissipates and s. 114A(2) of the Act loses its bite. (paras 16, 20, 21 & 23)

(3) *The law relating to cyber publication was clear. Once the registered subscriber of a blog or website where the offending publication originates from had been positively identified, the burden lay on the registered subscriber to prove on the balance of probability that he was not the author of the publication*. For this purpose, it was not sufficient for him to merely put the plaintiff to strict proof of the averments made against him. (para 18)

(4) Not a shred of evidence was produced by the first defendant to prove that he was not the person who uploaded the defamatory statements, let alone to prove that the statements were not defamatory of the plaintiffs

or to establish any other defence associated with actions in defamation. He merely denied ownership of the two blogs which had been contradicted by Telekom Malaysia and TM Net. A bare denial without more is incapable of rebutting the statutory presumption, nor does it constitute a defence on the merits. The first defendant failed to show any defence on the merits touching on the real matters in question ie, a substantive defence that he did not publish the defamatory statements or, for that matter, any defence at all to deflect the plaintiffs' claim. (paras 24 & 27)

(emphasis added)

[180] An examination of the grounds of judgment will reveal that the SCJ had referred to the Hansard as reported in the Utusan Malaysia newspaper on 19 April 2012 regarding the 2012 amendment by the Minister at the time, which resulted in the enactment of s. 114A to the EA, which stated that the objective of the section was to address the issue of the use of pseudonyms and offenders hiding behind anonymity in publication through the internet.

[181] The SCJ also stated that those with criminal intent had employed means of hiding their identity and there was difficulty in determining the true source of a particular email or other electronic communication and that it was to address these difficulties that the amended section was enacted.

[182] Section 114A(2) of the EA is clear that a person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published the publication. From the evidence adduced, this would place the appellant as the owner of those email addresses and squarely within the ambit of the said provision.

[183] In the view of the SCJ, the emails which were also classified as documents under s. 3 of the EA and had also fulfilled the requirements of documents produced by a computer in accordance with s. 90A of the EA, also fell under the ambit of s. 114A of the EA.

[184] Based upon the interpretation of the said section as well as the intention of Parliament in enacting the section as gathered from the aforementioned case, I find no cause to disagree with the findings made by the SCJ in this respect. The SCJ was therefore correct in holding that the presumption under s. 114A of the EA had arisen against the appellant.

[185] The appellant said that he had never sent the series of emails (P41) but he did not adduce any evidence to show that anyone else may have had access to those email accounts.

[186] The fact of the ownership and the use of the emails, opera@pc.jaring.my, arbitration@yyresort.com and george@jmr.com.my were not denied by the appellant.

[187] During the course of cross-examination, the appellant also agreed that JMR and the KLRCA had two email addresses of his, namely, opera@pc.jaring.my. and arbitration@yyresort.com as evident on the letterhead P6 prepared by the appellant.

[188] The appellant had also agreed that the two email addresses namely, opera@pc.jaring.my. and opera83@streamyx.com were in the series of emails in P41.

[189] The appellant maintained that he never given the email address opera83@streamyx.com to JMR and that he never sent P41. This however begs the question of how it was then that the said email address could appear in P41?

[190] Further to this, SP5 from the network provider JARING confirmed through P34, P35 and P36 that the email accounts were registered in the name of the appellant and were still active at the material time which was August until December of 2008.

[191] SP5 said that the email address opera@pc.jaring.my. was registered in the name of the appellant and registered on 12 September 1995 and after the package was changed from dial-up to new-dial-up on 10 July 2007 according to (P33) and (P34).

[192] Based upon the audit trail (P35), it was confirmed that the said account was functioning between August until December 2008. SP1 had further in her evidence confirmed that the appellant had used the said email address in her dealing with the appellant. See P5.

[193] The appellant said that he did not have any email account known as george@jmr.com.my and that he had never at any time used such an email account to communicate with SP8 or SP11.

[194] SP8 and SP11 had said that they had been asked by the appellant to create an email account for him. As a result of this and through the assistance of SP3 who was an IT officer in JMR, a new account was registered in the name of "George Macilwaine".

[195] The appellant thereafter, replied to SP8 using the email address opera@pc.jaring.my stating that he would use the registered email of George Macilwaine (P41).

[196] This was sufficient evidence that the email address of opera@pc.jaring.my belonged to the appellant. Although there existed the possibility that the "username" may have been changed to George Wilson, it nevertheless was the same email address that was used.

[197] The fact that the appellant had opened and operated the email address of george@jmr.com.my had been proven through the exchange of communication between the emails of george@jmr.com.my and opera@pc.jaring.my, as explained by SP8.

[198] The SCJ on his grounds also referred to the fact of continuous communication between SP8 and SP11 and the appellant using the emails, george@jmr.com.my and chongsiewtat@jmr.com.my. This fact was also confirmed by SP3 who carried out a test involving the email settings.

[199] In exh. (P41), SP8 had confirmed that there was communication between himself and the appellant using the email address of chongsiewtat@yahoo.com addressed to the email of george@jmr.com.my. This email was replied to by the appellant using the email of opera@jaring.my. The SCJ correctly concluded from this that this proved the appellant had used both the emails and knew its contents.

[200] The respondent submitted that the evidence showed that the email account of george@jmr.com.my was created by SP3 and SP8 confirmed having sent the details of that email account to the appellant's other personal email address known as opera@pc.jaring.my. and the series of emails were replied to through the email account of george@jmr.com.my.

[201] It does not make any sense given the above, how the appellant can claim to have no knowledge of the email address of george@jmr.com.my when there was evidence that those emails were replied to using that particular email address.

[202] There was also evidence to show that the appellant had used the email of veltsen-roget@inbox.com while communicating with SP8 regarding issues that required discussion, which the latter had confirmed.

[203] The respondent had adduced the contents of this communication through exh. P28.

[204] This was also confirmed by Mohd Fadzlee bin Sulaiman (SP4), who was the Senior Digital Forensic Analyst from Cybersecurity Malaysia that the email address veltsen-roget@inbox.com was discovered in the hard-disc computer in the Dell Notebook (P15A and P15B) belonging to the appellant which was seized by the Malaysian Anti-Corruption Commission (MACC) at his house in Kuantan.

[205] The respondent had also proven that the appellant used the email address of arbitration@yyresorts.com on his letterhead while accepting the appointment as arbitrator.

[206] There also was in evidence an email sent by the solicitors for the appellant relating to the arbitration using the email address arbitration@yyresorts.com and the contents of this email were then resent by the appellant to SP11 using the email of george@jmr.com.my.

[207] SP11 also confirmed on 7 January 2011 that he received an email from george@jmr.com.my relating to the dispute between JMR and Nanjing where the said email constituted a series of forwarded emails sent by the lawyers Ghazi Lim and Ong-Manecksha using the email of arbitration@yyresorts.com.

[208] The appellant had also contradicted himself when he initially said that he had no knowledge of P68 and the email of arbitration@yyresorts.com while later admitting that he had written the email.

[209] Under all circumstances therefore, the appellant had failed to rebut the statutory presumption under s. 114A(2) of the EA on a balance of probabilities that he was the owner of the emails, opera@pc.jaring.my, opera83@streamyx.com, veltsen-roget@inbox.com, and arbitration @yyresorts.com.

[210] The unrebutted presumption therefore showed that the relevant emails were genuine. There was no necessity for Metadata evidence to be adduced in order to prove this.

[211] In any event, the fact of the ownership, usage and genuineness of the above-mentioned emails and that they were sent, were adequately proven by the oral testimonies of the related witnesses namely, SP8 and SP11, which constituted direct evidence quite independently of the presumption under s. 114A(2) of the EA or the need to adduce the Metadata evidence.

Rejection Of SD3's Report And Testimony

[212] There were two expert reports tendered in evidence during the trial. The report produced by SP4 on the prosecution's behalf was marked as exh. P11 while that produced by the defence by SD3 was marked as exh. D97.

[213] The appellant submitted that the conclusion reached by the SCJ in preferring the evidence of SP4 over SD3 because he doubted the technique employed by SD3 in carrying out the test as it was contaminated, was seriously flawed.

[214] The appellant submitted that even if the test carried out by SD3 was not according to international standards, this did not automatically render exh. D97 inadmissible or result in SD3's testimony not worthy to be considered in its entirety.

[215] This, it was submitted, was because there were two aspects to SD3's evidence, namely, the practical aspect and the part relating to the Metadata pertaining to the purported emails.

[216] The report (D97) by Fong Choon Fook (SD3) dated 13 May 2016, essentially made the findings that firstly, the integrity of the hard disc processed by Cyber Security Malaysia was compromised and secondly, the cache file web browser was considered insufficient to be taken as genuine emails.

[217] The respondent however, questioned the expertise of SD3 on the basis of his qualifications. SD3 agreed to the suggestion of the respondent that there were two other levels of certification needed to be taken in order to be considered a competent digital forensic analyst.

[218] The following excerpt from the evidence of SD3 during cross-examination will show the attack launched upon his level of competence in the area of digital analysis:

> Agree that there are subsequent, after GIAC forensic examiner there are subsequent qualification levels of training that one has to undertake to become a competent digital forensic analyst?
>
> A: Agree
>
> Q: I put it to you that you did not take such a course, the level two GIAC forensic analyst GCIA?
>
> A: Agree.

[219] SD3's expertise continued to be assailed further as evident from the following:

> Q: Now let us look at your, look at para 5 and also you've got para 5? Now in your earlier testimony you said that you have given evidence in Court before and this is third time, right?
>
> A: Agree, yes.
>
> ...
>
> Q: If you recall was that a civil or criminal trial?
>
> A: Both.
>
> Q: Both, one each?
>
> A: Yes.
>
> ...
>
> Q: I put it to you, that this other two occasions which you gave evidence the area is different from today?
>
> A: Agree.
>
> Q: No, let's go to your previous cases, case no.1, what was your evidence in case no.1, regarding what?
>
> A: Internet Security
>
> Q: Alright. Now what about case no.2?
>
> A: Case no. 2 is also PC security, computer security.

[220] Based on the above, it was evident that SD3 did not possess any expertise in the area of forensic digital analysis as his area of expertise was more in the field of IT security which was quite different from the subject matter at hand.

[221] Next, the methodology employed by SD3 during his analysis also came under attack in that SD3 had failed to confirm the hash value. The importance of the hash value was testified to by Mohd Fadzlee (SP4) as follows:

A

Q: ... Soalan saya En Fadzlee, boleh En Fadzlee jelaskan sedikit tak apa maksud hash value ini, memandang ia dibangkitkan oleh En Fong? Bagaimana ia, apakah maksudnya dan bagaimana ia diperolehi?

A: Hash value merupakan satu nilai yang diperolehi oleh untuk menunjukkan identity suatu data. lanya boleh diperolehi dengan pelbagai perisian sebagai salah satu contoh MD5 Sum. la juga merupakan satu digital signature terhadap sesuatu content atau data.

B

Q: En Fadzlee, has value ini kalau mengikut dari segi digital forensic ini, it is best taken when, bila paling afdal sekalilah?

C

A: Pada kebiasaannya hash value akan dibuat atau akan disahkan sebaik sahaja rampasan atau sitaan dibuat.

Q: Kenapa En Fadzlee berkata sedemikian?

A: Ini adalah kerana untuk mengekalkan integrity sesuatu data itu.

D

Q: Menurut En Fong, En Fadzlee, setelah proses imaging dibuat oleh beliau, beliau tidak verify hash value yang tertera tool Tableau yang digunakan dengan pihak CSM. Boleh En Fadzlee sahkan perkara ini?

A: Ya, benar.

E

Q: Soalan saya En Fadzlee, apakah kepentingan untuk hash value ini diversify selepas imaging dijalankan?

A: Hash value perlu diversified selepas imaging, selepas proses imaging atau cloning dijalankan kerana kita ingin mendapatkan integrity sesuatu data di mana jika hash value tersebut sama kita boleh membuat kesimpulan bahawa integrity data tersebut dimaintain dan sebaliknya.

F

Q: Ok. En Fadzlee, jika kita rujuk muka surat 8, D97 ini, report En Fadzlee, kita dapat lihat dua hash value yang berbeza dan juga lokasi yang berbeza. Boleh En Fadzlee ulas perkara berkenaan has value, dua hash value yang berbeza dan lokasi yang berbeza?

G

A: Pada pendapat saya kemungkinan terdapat berlakunya ESD, electronic discharge ataupun kerosakan pada Bahagian elektronik tersebut.

H

Q: Jika terdapat dua kemungkinan yang En Fadzlee sebutkan tadi, adakah ia boleh menghasilkan hash value yang berbeza?

A: Apabila kemungkinan yang saya sebutkan tadi berlaku perkakasan elektronik pada kebiasaannya atau pun data yang dibaca adalah secara tidak normal dan ini berkemungkinan menyebabkan hash value yang dihasilkan berlainan.

I

[222] SD3 admitted that he did not ascertain the hash value with the Cyber Security Malaysia as evident from the following:

Q: But it's reflected on the table. Correct? You did not verify this value with the CSM?

A: Agree

[223] The other bone of contention with the evidence of SD3 is that he had failed to utilise the anti-static mat in the course of his analysis of the exhibits. SP4 had explained the importance of using the anti-static mat in analysing the exhibits and he explained as follows:

Q: Ok. En Fadzlee, saya ingin merujuk kepada satu proses imaging yang telah dijalankan pada 23 March di Cyber Security. En Fadzlee boleh sahkan hadir pada ketika proses tersebut dijalankan?

A: Ya.

Q: Boleh En. Fadzlee sahkan bahawa semasa proses cloning dan imaging dilakukan oleh En. Fong, beliau tidak menggunakan anti-static mat?

A: Ya, benar.

Q: Pada pendapat En. Fadzlee sebagai seorang pakar forensic digital, apakah kepentingan penggunaan anti-static mat?

A: Penggunaan anti-static mat adalah untuk mencegah daripada berlakunya electrostatic discharge ataupun ESD.

Q: Boleh En Fadzlee terangkan lebih lanjut apa yang dimaksudkan dengan ESD?

A: Electronic discharge bermaksud satu aliran elektrik yang berlaku secara spontan yang disebabkan oleh dua (2) objek yang mempunyai cas elektrik dan bersentuhan di antara satu sama lain

Q: Jadi En Fadzlee sebutan anti-static mate untuk elakkan ESD inilah?

A: Ya, benar.

Q: Soalan saya seterusnya En. Fadzlee. Adakah penggunaan anti-Static mat ini diperlukan untuk barang-barang ekshibit seperti computer hard drive?

A: Ya, perlu.

Q: Kenapa?

A: Seperti yang saya katakan tadi anti-static mat adalah perlu supaya ESD tidak berlaku ke atas bahan-bahan ataupun perkakasan elektronik atau digital.

Q: Ok. Bagaimana pula semasa proses cloning atau imaging, adakah ia perlu atau tidak penggunaannya?

A: Ya, kedua-duanya perlu.

A

Q: Perlu ya. Jika tiada digunakan anti-static mat ini apa yang akan jadi? Apa akan boleh berlaku?

A: Jika tiada penggunaan anti-static mat, adalah terdedah, kemungkinan terdedah dengan risiko ESD seperti yang saya nyatakan sebelum ini.

B

[224] SD3 agreed during the course of cross-examination that he did not use an anti-static mat while performing the analysis. This was evident from the following excerpt of his evidence:

Q: I put it to you did not bring any static-mat?

C

A: Agree

Q: And also you did not request from SCM for an anti-static mat to be provided to you.

A: Agree.

D

[225] SD3 also agreed during cross-examination that digital exhibits are sensitive and that it was important to conduct the analysis in a controlled environment. The relevant excerpt follows:

Q: Do you agree that to preserve integrity any analysis of the exhibit has to be done in a controlled environment?

E

A: Agree.

Q: And controlled environment amongst others it means you have a designed lab, you have a controlled temperature, proper workstation using the right forensic tools?

A: Agree.

F

Q: And agree when dealing with forensic evidence of the use of antiseptic wrapper and antiseptic mat is important to ensure that the exhibits are not affected by electromagnetic filed.

A: Agree.

G

[226] The SCJ in his grounds, referred to the exhibits being exposed to the 'electro-magnetic field' as a result of the failure of SD3 to use 'anti-static wrapper' in conducting the analysis. The SCJ also referred to the evidence of SP4 that the use of the 'anti-static' mat was to eliminate the occurrence of 'electro static discharge'.

H

[227] The SCJ accordingly went on to find that the exhibits analysed by SD3, namely, the 'Seagate Hard disc' (P15B), Harddisc Mactor (P19B) and the Kingston Thumbdrive (P2A) were contaminated and compromised.

[228] In the premises, the SCJ stated that he was more predisposed to

I

accepting the expert report given by SP5 as compared to that of SD3. The SCJ also stated that the expert report of SP5 was done according to the Standard of Procedure (SOP) of the Cybersecurity Malaysia.

[229] The SCJ therefore concluded that he was satisfied that the sample used by SP5 during the course of his analysis was in order and that the defence had failed to show that it was contaminated.

[230] The above findings of the SCJ was based upon a sound basis of comparison between the methodology used by SD3 as compared to SP5 and their respective advantages and disadvantages.

[231] His assessment and findings were also based upon having the audio and visual advantage of the witnesses. In the circumstances, I find no cause to disturb his findings in respect of this issue.

The Unused Emails In The Civil Proceedings

[232] The appellant submitted that there were unused emails and that SP11's lawyer in the civil proceedings had not been called by the prosecution. This, it was contended, raised the adverse inference under s. 114(g) of the Evidence Act 1950 against the respondent.

[233] The prosecution has the discretion to call any witnesses as they see fit. The only limitation upon this prosecutorial discretion is that they must call all witnesses essential to the unfolding of their case, failing which, there exists a gap. See *Abdullah Zawawi Omar v. PP* [1985] 2 CLJ 2; [1985] CLJ (Rep) 19; [1985] 2 MLJ 16.

[234] Aside from this, the case of *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 20; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492 makes it clear that the adverse inference can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. There was no merit thus to the contention of the appellant in respect of this issue.

Decision

[235] Under all the circumstances and for the reasons explained above, I find no appealable error in the findings and conclusions by the SCJ. In the premises, the appeal against conviction is dismissed.

Sentence

[236] The SCJ after hearing mitigation, passed a sentence of six months imprisonment from date of conviction and a fine of RM20,000 in default imprisonment of six months.

[237] The respondent argued that the sentence passed was inadequate having regard to the circumstances. It was submitted that the sentence passed was not commensurate with the nature of the offence committed which was serious in nature.

[238] It was also submitted by the respondent that the actions of the appellant had resulted in adverse implications to the image and reputation to the KLRCA. It was also submitted that a deterrent sentence ought to be passed. They urged this court to therefore increase the term of imprisonment passed.

[239] Learned counsel for the appellant, on the other hand, submitted that the custodial sentence meted out to the appellant was excessive based upon the following factors:

(i) The appellant's old age and health;

(ii) There was no evidence of damage suffered by KLRCA; and

(iii) The appellant has no previous convictions.

[240] Counsel submitted that the appellant is 75 years of age and suffers from Type 2 Diabetes, shingles, torn left leg posterior cruciate ligament and torn tendon in his left shoulder.

[241] As far as the submission that there was no evidence of damage suffered by the KLRCA, as I indicated when analysing the case in respect of the conviction, the evidence of such damage is a matter which can be properly inferred from the circumstances.

[242] In the normal course of events, evidence of such damage would be difficult to prove. I am not persuaded therefore by the submission of the appellant in respect of this issue.

[243] The appellant however, stands on firmer ground in respect of the other factors, namely, his age, health and the fact that he is a first offender.

[244] A perusal of the grounds by the SCJ will show that he took into consideration the fact that the reputation of the KLRCA had been tarnished and in the light of that, had seen fit to impose a custodial sentence in order to serve as a lesson to the appellant that he ought to have had displayed true fairness in the carrying out of his responsibilities as an arbitrator instead of using the position to benefit himself.

[245] The SCJ had also considered the fact that the fault of the appellant in the whole episode was only limited to the act of not disclosing his independence and interest in the statement of independence. In light of this, the SCJ found that the appellant was not deserving of a heavy sentence.

[246] He nevertheless imposed a custodial sentence of six months and a fine of RM20,000.

[247] With regard to the element of public interest and imposing a deterrent sentence, it must be appreciated that in the normal course of human affairs, it is unlikely that what someone in the position of the appellant did would be a common occurrence.

[248] Complaints of this nature are far and few between. The act committed by the appellant is not a common complaint or occurrence in the arbitration circuit. In other words, such an act as committed by the appellant is not rampant. Therefore, the element of deterrence cannot be a compelling reason here for influencing the sentence to be imposed.

[249] The age of the appellant is an influencing factor in punishment as is the fact that the appellant is a first offender. However, it also cannot be denied that the offence committed is serious in nature. The actions of the appellant have compromised the integrity of the process by which arbitrators are appointed. Thus, some form of custodial sentence is merited.

[250] Under all the circumstances, and taking into account the submission of parties, I reduce the term of imprisonment passed from six months to one month. The fine is however increased from RM20,000 to RM50,000 in default, one-year imprisonment.

[251] The cross-appeal by the prosecution is dismissed.